Supreme Court, U.S.
FILED
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No. 05-211

IN THE

Supreme Court of the United States

October Term 2005

LINDA STETLER AND DENNY STETLER,
Petitioners,

versus

SRN ENTERPRISES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky

PETITION FOR A WRIT OF CERTIORARI

LINDA STETLER
DENNY STETLER
Spring Creek Air Park
Albany, Kentucky
Pro Se Petitioners

WESTERFIELD-SONTE CO., 619 W. KENTUCKY-P.O. BOX 3281, LOUISVILLE, KY.

QUESTIONS PRESENTED

1. Whether the Kentucky Court of Appeals erroneously held, and the Kentucky Supreme Court erroneously affirmed, that the Petitioner's appeal to that court was not timely filed.

2. Whether a party can file a second motion, pursuant to CR 59.05, raising new questions which have arisen since the filing of the first CR 59.05 motion and, therefore, were not raised upon the initial motion; and, if so, whether the filing of such a motion tolls the time for filing a notice of appeal.

3. Whether the Kentucky Court of Appeals erroneously held that the Petitioner's second CR 59.05 motion raised no new issues which had not been raised in her first CR 59.05 motion.

4. Whether the actions of the trial court infringed the Petitioner's right to the Due Process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2005
No._____

Linda Stetler and Denny Stetler, Petitioners

v.

SRN Enterprises, Inc.. Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Linda Stetler and Denny Stetler, the Petitioners, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the Commonwealth of Kentucky entered in the above-entitled case on June 11, 2005

OPINION BELOW

The judgment of the Supreme Court of Kentucky (Appendix D) was entered on June 11, 2005.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257.

PARTIES

Linda Stetler and Denny Stetler, Petitioners

SRN Enterprises, Inc., Respondent

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STATUTES INVOLVED

United States Constitution, Amendment V

United States Constitution, Amendment XIV § 1

CR 59.05

STATEMENT OF THE CASE

The Petitioners, Linda Stetler and Denny Stetler, are now and were at all times pertinent hereto, the owners in fee simple of a certain tract of real property in Clinton County, Kentucky, known as Spring Creek Air Park. This property consists of an airport runway, a resort lodge, and numerous building lots which the Movants were and are developing into a resort area. The aforesaid realty is located adjacent to Dale Hollow Lake, and development of the resort has been proceeding for approximately ten years.

On January 24, 1997, the Stetlers executed a note and mortgage in favor of Spring Creek Enterprises, Inc, and the Spring Creek property served as the collateral securing the indebtedness. The Stetlers transferred the Spring Creek property to Spring Creek Air Park, Inc. in June, 1997, subject to the aforesaid mortgage. Spring Creek Enterprises, Inc., assigned its rights to SRN Enterprises, Inc. on December 30, 1998.

On July 31, 2002, SRN filed the instant mortgage foreclosure action, and on April 24, 2003, moved the court to grant summary judgment and to appoint a receiver. The court granted summary judgment by order entered June 16, 2003, and by further Order, dated July 7, 2003, appointed a receiver. Upon learning of these orders, Movants' then counsel, Charlie C. Pharis, Esq., contacted the Clinton Circuit Clerk with the intention of preparing and filing a motion to vacate the order. However, he was told by the clerk that the file had been either

lost or misplaced. It has not been located at this writing, and is still missing.

On June 25, 2003, the Movants' then counsel, Mr. Pharis, filed a Motion to Alter, Amend or Vacate the Summary Judgment and Order of Sale. Loss of the file was not among the reasons advanced in that motion, since Mr. Pharis had not yet been advised by the Clinton Circuit Clerk that the file was missing. It was this Motion which the circuit court granted by Order dated March 6, 2004 and by a second Order dated March 9, 2004.

The Clinton Circuit Clerk submitted an affidavit which was filed in the record on July 25, 2003, in which she stated that:

> The Order for Summary Judgment, the Order of Receivership, and the Motion to Alter, Amend or Vacate were all filed along with the Supplemental Memorandum for each after the loss of the file.

Affidavit of Linda (Polly) Groce ¶ 5.

It is clear, therefore, that when the trial court's order granting summary judgment, and the Petitioners' motion to vacate that judgment were filed, there was no record of the file extant, since that record had already been lost or misplaced, and has never been recovered.

Thereafter, on October 11, 2003, the Petitioners retained new counsel and filed a motion, pursuant to CR 60.02, to set aside the summary judgment and order of sale on the grounds that the file had been lost. **This motion has never been ruled upon, and remains pending before Clinton Circuit Court.** Subsequently, on January 30, 2004 Respondent filed a motion asking the court: "to enter an order establishing the record." Respondent's counsel attached his affidavit which stated:

> I attest that the pleadings, orders, and other

documents attached hereto as Exhibit A are true and accurate copies of the pleadings of the above captioned case.

Affidavit of Henry E. Kinser ¶ 2.

On March 5, 2004, Clinton Circuit Court entered an order overruling the Petitioners' motion to alter, amend or vacate, granting Respondent's motion to reestablish the record, and setting the amount of the supersedeas bond (although the Movants, obviously, had not yet filed a notice of appeal). On March 18, 2004, the Petitioners filed a Motion to Alter, Amend or Vacate that Judgment, **raising new and different issues than those which they had raised in the motion to alter, amend or vacate which they filed on June 25, 2003**, and they also asked the court to make findings and conclusion in support of its summary judgment.

The circuit court overruled these motions by order dated March 30, 3004 and entered of record April 1, 2004. The Stetlers thereupon appealed to the Kentucky Court of Appeals. On May 19, 2004, Respondent moved that court to dismiss the Movants' appeal, on the grounds that the appeal was not timely filed. As shown below, the Respondent's argument was based upon a misapprehension of pertinent case law, and should have been disregarded by the Court of Appeals.

That court, however, granted the Respondent's motion and dismissed the appeal. Petitioners filed a timely motion to reconsider. That motion was denied by order dated 8/23/04. The Petitioners then moved the Kentucky Supreme Court to grant a Discretionary Review of that Order of Dismissal.

The Kentucky Supreme Court denied that Motion by Order dated June 11, 2005. This appeal followed.

REASONS FOR GRANTING THE WRIT

I. THE PETITIONERS' APPEAL WAS NOT UNTIMELY.

As grounds for its Motion to Dismiss, SRN stated:

> This appeal should be dismissed because the Notice of Appeal was not timely filed. First, after a motion to alter, amend or vacate a judgment was filed on June 25, 2003 and overruled on March 5, 2004, an additional motion to alter, amend or vacate the Summary Judgment and Order of Sale does not lie. After a motion to alter, amend or vacate a judgment is overruled, an appeal must issue within thirty days thereafter. A party cannot extend the appeal time by filing additional motions to alter, amend or vacate the same summary judgment and order of sale. Thus, the summary judgment and order of sale became final and non-appealable on April 5, 2004. The appeal was filed on May 1, 2004, almost two months after the original motion to alter, amend or vacate was overruled.

Respondent's Motion at 2.

The Respondent has misapprehended both the facts and the law upon which it relies. First, Respondent has evidently failed to note that Judge Weddle issued a second Order dated March 6, 2004 and entered of record on March 9, 2004, which supplemented and replaced his Order of March 5, 2004.

Second, the timely motion which Petitioners filed on March 19, 2004, did not ask the trial court "to alter, amend or vacate the Summary Judgment and Order of Sale," as the Respondent mistakenly alleged. As a reading of that motion will show, the Petitioners' motion of March 19, 2004 asked the trial

court to alter, amend or vacate only so much of its order as "sustained the Plaintiff's Motion to Re-establish the Record, and set the amount of the supersedeas bond as $2,375.951.00." **Neither the Petitioners' motion, nor their supporting memorandum of law, contains any language which, even arguably, suggests that they were seeking to readjudicate the trial court's holdings regarding the summary judgment motion or the appointment of a receiver.**

The holdings which the Petitioners' motion of March 19, 2004 asked the trial court to reconsider concerned new issues which had arisen since that court had issued its summary judgment on June 16, 2003. Specifically, the Respondent's motion to reestablish the record was not filed until February 23, 2004. It obviously was not adjudicated by that court's summary judgment, issued more than eight months previously, nor was it raised in the motion to reconsider which the Movants had filed ten days later.

The second issue which the Petitioners raised in their motion of March 19, 2004, was the amount of the supersedeas bond, That matter, likewise, was not addressed in the court's summary judgment of June 16, 2003, nor in the Movants' motion to alter, amend or vacate filed on June 25, 2003.

The Respondent evidently reads CR 59.05 as affording a party **no opportunity whatever** to seek a review of these two rulings in the trial court. Such an application of CR 59.05 would not comport with the spirit of the civil rules, nor with the Due Process of Law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America, and such is clearly not the law. As the treatise American Jurisprudence, Second Edition, sets out the correct rule:

> There are various views as to the finality of orders regarding motions for relief from judgments or orders. Some court hold that the fact that a court has denied a motion to vacate a

judgment does not deprive it of the power to consider a second motion for the same purpose, whether based upon the same or a different ground. Other should that successive motions cannot be made on the same ground but should be entertained when based on new grounds not covered by the former motion and not then known or available to the party, or where there was excusable neglect in not bringing forward all the grounds in the first instance. It is said that the decision of a court in denying a motion to vacate a judgment becomes final and res judicata only as to the question put in issue. Other courts maintain, however, that a denial of a motion for relief from final judgment is appealable and that avenue should be pursued by an aggrieved party, not a second motion for relief. However, in some cases, such successive post-judgment motions may be permitted. If, for example, the judge has rendered a new judgment pursuant to a motion to alter, amend, or vacate a judgment, the party aggrieved by the new judgment may have had no reason to make such a motion earlier.

There is also authority that . . . a judgment of a court denying a motion to vacate a judgment of a court denying a motion to vacate a judgment concludes the parties and their privies, not only as to the grounds contained in such motion, but aws to all grounds for the vacation of the judgment which might have been alleged.

47 AM. JUR.2D *Judgments* § 872 at nn. 69-74, 77 (1995); CHARLES ALAN WRIGHT, ARTHUR R. MILLER, AND MARY KAY

KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2817 at n. 11 (1995)(second Rule 59(e) motion permitted if it "raise[s] new grounds which could not have been raised on the first motion").

In this regard, the attention of the Court and counsel is respectfully directed to the holding of the United States Court of Appeals for the Fifth Circuit in *Nobby Lobby, Inc., v. City of Dallas*, 970 F.2d 82 (5th Cir. 1992), a case which arose on closely analogous circumstances to those of the instant case, and considered the correct application of the parallel federal rule, Rule 59(e), F.R.C.P. Wrote the court:

> Before addressing the merits of the City's appeal, we must first consider the threshold issue of our jurisdiction. Nobby Lobby argues that this Court lacks jurisdiction because the City did not perfect a timely appeal. Under Rule 4(a)(1) of the Federal Rules of Appellate Procedure, a party must file its notice of appeal within thirty days after the date of entry of the judgment or order from which it appeals. If the party files a timely motion under Rule 59 of the Federal Rules of Civil Procedure to alter or amend the judgment or for a new trial, however, "the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Fed.R.App.P. 4(a)(1). Nobby Lobby contends that the City's second motion to reconsider, filed May 8, 1991, failed to toll the time period for filing its notice of appeal. If true, the City's June 14, 1991 appeal would be untimely for all orders except the denial of the City's motion to recuse, which itself is not a final appealable order.
>
> In general, a second motion to reconsider does not interrupt the thirty-day period to appeal a

> judgment where the second motion raises substantially the same grounds as urged in the earlier motion. Thus, if the City'sw second motion to reconsider merely re-urged grounds asserted in its first motion, the later motion could not toll the appeal period. In fact, the second motion did, in large part, re-urge arguments made in the City's April 11, 1991 Motion to Reconsider, Motion to Alter or Amend and Alternatively for New Trial.
>
> Nevertheless, in the second motion, the City also moved the district judge to recuse himself, vacate the existing judgment, and grant a new trial because of newly discovered evidence, allegedly demonstrating that the judge had a financial interest in the outcome of the suit. Despite the similarities between the City's two motions, the first motion did not assert the trial judge's alleged bias as a basis for a new trial. Thus, the second motion, by presenting at least one completely different ground for relief from the judgment, interrupted the time allowed for filing an appeal, and that City's appeal was timely. The fact that the City filed an earlier motion to reconsider *on different grounds* does not change this result. Moreover, the fact that the motion to recuse is itself non-appealable also does not affect the result.

Nobby Lobby, Inc., v. City of Dallas, 970 F.2d at 85-86 (emphasis by court)(citations and internal quotations omitted).

The United States Court of Appeals for the Federal Circuit explained the reason for this rule in *Kraft, Inc. v. U.S.*, 85 F.3d 602 (Fed. Cir. 1996), in which it wrote:

> The time limit would be a joke if parties could continually file new motions, preventing the

> judgment from becoming final. The 10 days runs from the initial judgment, so later motions are not timely. Yet the purpose of Rule 59 is to allow the distr4ict court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings. The purpose of the rule suggests that when a court *alters* its judgment, **a person aggrieved by the alteration may ask for correction**. A successive motion directed to the same judgment is ineffectual, but when there is a new judgment – an alteration independently sufficient to restart the time for appeal – there is also a new period in which to file a motion under Rule 59.

Kraft, Inc. v. U.S., 85 F.3d at 606-07 (emphasis by court)

As authority for its holding, the *Kraft* court cited the United States Supreme Court's holding *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), in which this Court stated:

> [T]he mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken . . . begin to run anew. The test is a practical one. the question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

Federal Trade Commission v. Minneapolis-Honeywell

Regulator Co., 344 U.S. at 211-13.

The United States Court of Appeals for the Sixth Circuit adopted the rule set out above in *York v. Tate*, 858 F.2d 322 (6th Cir. 1988). In its holding, the court first set out language from *Charles v. Daley*, and then continued:

> We find the reasoning of the Court of Appeals for the Seventh Circuit persuasive. We recognize the need for finality, and it may have arguably been the better practice for respondent to have appealed directly from the district court's grant of petitioner's motion to alter judgment rather than filing another motion to reconsider – especially if the successive Rule 59(e) motion does not raise any new arguments. Nevertheless, where, as here, the court grants a Rule 59(e) motion and significantly alters its prior judgment, we find that the federal rules do not prohibit the opposing party from filing a Rule 59(e) motion in an attempt to persuade the district court to reinstate its original judgment. For the purposes of Rule 59(e), a new judgment is one that changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered.

York v. Tate, 858 F.2d at 326.

The Sixth Circuit reaffirmed this holding in *Moody v. Pepsi-Cola Metropolitan Bottling Co., Inc.*, 915 F.2d 201 (6th Cir. 1990), in which that court wrote:

> Motions for reconsideration of a judgment are construed as motions to alter or amend the judgment and are time tolling for the purposes of Rule 4(a)(4). However, a motion to reconsider an order disposing of a time tolling

> post-trial mmotion of the kine enumerated in Rule 4(a)(4) does not again terminate the running of the time for appeal, unless a grant of the earlier post-trial motion effectively results in anneew judgment and the motion to reconsider is filed by the adversely affected party requesting reinstatement of the original judgment.

Moody v. Peosi-Cola Metropolitan Bottling Co., Inc., 915 F.2d at 206 (citations and internal quotations omitted).

State court decisions construing their parallel state rules include *Ex. Parte Dowling*, 477 So.2d 400, 403-04 (Ala. 1985); *Collister v. Inter-state Fidelity Building & Loan Ass'n*, 38 P.2d 626, 627-28 (Ariz. 1934); *State Dept. of Transp. v. Bailey*, 603 So.2d 1384, 1387 (Fla. App. 1 Dist. 1992) (second motion to reconsider permitted where issue, though raised, was "not actually litigated and decided" on first motion to reconsider); *Moore v. W O O W, Inc.*, 110 S.E.2d 311, 315 (N.C. 1959); *see, Isemoto Contracting Co., Ltd. v. Andrade*, Hawaii App., 616 P.2d 1022, 1025 n. 2 (1980); *Wilson-Harris v. Southwest Telephone Co.*, 114 P.2d 986, 988, 990 (Okla. 1943); *Harjo v. Johnston*, 194 P.2d 985, 995 (Okla. 1940).

Of equal significance is the fact that extensive research has disclosed no case, in any jurisdiction, holding the contrary.

Applying this rule to the case at bar, it is clear that the matters raised by the Petitioners on their second CR 59.05 Motion were not raised on the first CR 59.05 Motion, and could not have been raised, because the second Motion concerned matters which arose subsequently to the trial court's adjudication of the first CR 59.05 Motion. Therefore, under the rule set out in the foregoing cases, the Petitioners were fully entitled to file a second CR 59.05 Motion raising issues which they had no opportunity to raise prior to that time; and the Petitioners' appeal which they filed subsequent to the denial of

their second CR 59.05 Motion, and which sought appellate review only of those matters which were considered in the second CR 59.05 Motion, was timely, and should not have been dismissed by the Court of Appeals.

In its order of 8/23/04, the Court of Appeals stated:

> In the case before this Court, the second motion for relief from the summary judgment did not raise any issues that had not been disposed of by the order denying the first post-judgment motion.

Order, 8/23/04, at 2.

Petitioners profess themselves mystified at this statement, which clearly is contrary to the facts. Even a cursory reading of the Petitioners' two CR 59.05 motions will show that the matters raised in the second CR 59.05 motion were not raised in the first motion, and could not have been, since they concerned matters which occurred after the first motion had been filed.

Respectfully, Petitioners insist that the ruling of the Court of Appeals rests upon clearly erroneous reading of the trial court record. The facts are directly the converse of those stated by the Court of Appeals, as a reading of the two motions in question will show. Petitioners urge this Court to read the two motions at issue, because they are confident that, having done so, the Court will find it necessary to correct the clear error in the Court of Appeals opinion, discretionary review of which was denied by the Kentucky Supreme Court

CONCLUSION

As shown above, the judgment of the Kentucky Court of Appeals by which it dismissed the appeal of the Petitioners was contrary to law and must be reversed. The Court, therefore, should grant Certiorari to the Kentucky Supreme Court and, upon hearing, should remand the action with directions that the Petitioners cause of action be reinstated. Petitioners pray for an Order of the Court so holding.

Respectfully submitted,

Linda Stetler
Denny Stetler
Spring Creek Air Park
Albany, KY
Pro Se Petitioners

APPENDIX

APPENDIX A

CR 59.05 Motion to alter, amend, or vacate a judgment

A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment.

APPENDIX B

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX C

Amendment V

Trial and Punishment, Compensation for Takings.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

Supreme Court of Kentucky
2004-SC-0743-D
(2004-CA-0886)

LINDA STATLER and
DENNY STETLER — MOVANTS

V. CLINTON CIRCUIT COURT
NO. 2002-CI-0131

SRN ENTERPRISES, INC. — RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Scott, J., would grant discretionary review.

ENTERED May 11, 2005.

Jos. E. Lambert

Chief Justice

APPENDIX E

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 2004-CA-000866-MR

LINDA STETLER, ET AL. **APPELLANTS**

APPEAL FROM CLINTON CIRCUIT COURT
v. **ACTION NO. 02-CI-00131**

SRN ENTERPRISES, INC., ET AL. **APPELLEES**

ORDER DENYING MOTION TO RECONSIDER

* * * * * * * * * * * * * * * *

BEFORE: DYCHE, GUIDUGLI, AND MINTON, JUDGES.

The appellant has moved this Court to reconsider the order of July 1, 2004, dismissing this appeal. Having carefully reviewed the motion to reconsider and the response thereto, the Court ORDERS that the motion to reconsider be, and it is hereby, DENIED

The first portion of the motion to reconsider addresses the appellants' contention that the judgment appealed was void since it was entered after the record had been lost. But in order to raise that issue, the appellants have to overcome this panel's prior ruling that the notice of appeal was not timely filed. The appellants rely on the case of Nobby Lobby, Inc. v. City of Dallas, 970 F.2d 82 (5th Cir. 1992). In that case, a federal circuit court of appeals found that a notice of appeal was timely when it had been filed within thirty(30) days of the denial of a second post-judgment motion. Even if that opinion were more than persuasive authority, it is distinguishable from the current situation. The express reason that the federal court found the notice of appeal to be timely in Nobby Lobby was that the second post-judgment motion raised an issue never previously addressed in the litigation and based upon newly discovered evidence. In the case before this Court, the second motion for relief from the summary judgment did not raise any issues that had not been disposed of by the order denying the first post-judgment motion.

ENTERED: 8/23/04

Robert W. Dyche, III
JUDGE, COURT OF APPEALS

APPENDIX F

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 2004-CA-000866-MR

LINDA STETLER, ET AL. **APPELLANTS**

APPEAL FROM CLINTON CIRCUIT COURT
v. **ACTION NO. 02-CI-00131**

SRN ENTERPRISES, INC., ET AL. **APPELLEES**

ORDER

(1) DENYING MOTION FOR INTERMEDIATE RELIEF
(2) GRANTING MOTIONS TO DISMISS
(3) DENYING MOTION FOR ADDITIONAL TIME

* * * * * * * * * * * * * * * * *

BEFORE: DYCHE, GUIDUGLI, AND MINTON, JUDGES.

The appellants have moved this Court for intermediate relief seeking to stay the enforcement of a transfer property pursuant to a judicial sale ordered by summary judgment. Emergency relief in this matter has previously been denied by a member of this Court.

First, the appellants allege that a stay is appropriate because the circuit court lacked jurisdiction to enter a final judgment without complying with the statutory procedure of KRS 422.240 to replace a missing record. It appears that the trial court granted the plaintiff's motion to replace the missing record material using copies contained in the attorney's file. The appellants have not alleged any inaccuracy in the record as reconstructed.

The rule in this Commonwealth has long been that "every circuit court has inherent power to supply, on proper proof, its own lost or defaced records." Deshong v. Cane, 62 Ky. (1 Duball) 309, 310 (1864). The statutory method providing for the reference of the matter to a commissioner is an alternative which may be used by the circuit court in appropriate circumstances. May v. May, 150 Ky. 522, 150 S.W. 685, 686 (1912). Contrary to the appellants' arguments, the statutory method of KRS 422.240 is neither exclusive not mandatory.

Secondly, the appellants seek to have this Court reduce the supersedeas bond as set by the circuit court. However, the appellants have not presented this Court with any evidence which would justify setting the bond at an amount other than that set by the circuit court.

Accordingly, the appellants' motion for intermediate relief is hereby DENIED.

The appellee has filed two motions with this Court seeking to have the appeal dismissed on the grounds that the notice of appeal was not timely filed. The summary judgment and order of sale containing the recitations of CR 54.02 was entered on June 16, 2003. The appellants then filed motions to alter, amend or vacate. Those post-judgment motions were denied by order of the circuit court entered March 5, 2004. That denial appears to have been restated in another order entered on March 9, 2004, which is not contained in any of the pleadings before this Court. Rather than file a nnotice of appeal within thirty (30) days of the March 5 order, appellants filed additional motions to alter, amend or vacate. Those motions were denied by order entered April 1, 2004. Notice of appeal was filed on May 1, 2004.

CR 73.02(1)(e) stays the time for the taking of an appeal until after post-judgment motions have been ruled on. However, motions to reconsider the denial of post-judgment motions do not toll the running of time for the taking of an appeal. Rodger v. Berry, Ky., 346 S.W.2d 43 (1961); Taylor v. Warmon, Ky., 331 S.W.2d 899 (1960).

The appellants argue that the March 5 orde also reestablished the record and set a supersedeas bond. They argue they were entitled to seek reconsideration of those decisions before filing their notice of appeal. However, the March 5 order did clearly deny the appellants' post-judgment motions to reconsider the summary judgment. The appellants were required to file their notice of appeal within thirty (30) days of that order. The May 1 filing was untimely.

Therefore, the Court ORDERS that the appellee's motions to dismiss be GRANTED, and this appeal is hereby DISMISSED.

The appellants' motion for additiontl time within which to file a prehearing statement is hereby DENIED AS MOOT.

ENTERED: 7/1/04

Robert W. Dyche, III
JUDGE, COURT OF APPEALS

APPENDIX G

COMMONWEALTH OF KENTUCKY
29TH JUDICIAL CIRCUIT
CLINTON CIRCUIT COURT

SRN ENTERPRISES, INC **PLAINTIFF**

V **ORDER**

LINDA STETLER, DENNY STETLER, SPRING CREEK AIR PARK, INC., CLINTON COUNTY, KENTUCKY, and UNITED STATES OF AMERICA **DEFENDANTS**

****

This action having come before the Court upon motion of the Defendants, Linda Stetler, Denny Stetler, and Spring Creek Air Park, Inc., to alter, amend or vacate and a motion to make findings and conclusions. The Court has considered the motions and being fully and sufficiently advised,

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the Defendants' motion to alter, amend of vacate and the motion to make findings and conclusions be and are bereby OVERRULED and DENIED.

GIVEN UNDER MY HAND AS SPECIAL JUDGE of the Clinton Circuit Court, this 30 day of March, 2004.

JAMES G. WEDDLE
JUDGE

APPENDIX H

COMMONWEALTH OF KENTUCKY
29TH JUDICIAL CIRCUIT
CLINTON CIRCUIT COURT

SRN ENTERPRISES, INC **PLAINTIFF**

v.

LINDA STETLER, DENNY STETLER,
SPRING CREEK AIR PARK, INC.,
CLINTON COUNTY, KENTUCKY, and
UNITED STATES OF AMERICA **DEFENDANTS**

SUMMARY JUDGMENT AND
ORDER OF SALE

This matter having come on for hearing on the Motion of Plaintiff, SRN Enterprises, Inc. ("SRN"), for a Summary Judgment and Order of Sale, and the Court having reviewed the record and being otherwise sufficiently advised, and it appearing that there is no genuine issue as to any material fact and that SRN is entitled to judgment as a matter of law, it is hereby ORDERED AND ADJUDGED as follows:

1. That SRN is hereby GRANTED a summary judgment against the Defendant, Spring Creek Air Park, Inc. ("Air Park"); the Court finds that the allegations contained in Plaintiffs' original Complaint and Amended Complaint are true and that as of February 28, 2003, there is due and owing to SRN the amount of $2,373,951.00; together with interest at the rate of 10% per annum until date of judgment, and interest at the legal rate of 12% from the date of judgment until paid, plus late charges, costs, attorney fees, and for payments made by SRN out of its own funds for taxes, insurance, and other charges as required to protect ant preserve the Mortgaged Property.

2. That to secure payment of its Judgment, SRN is hereby adjudicated to have a first mortgage lien on the following described property, located in Clinton County, Kentucky, which is more particularly described in **Exhibit A** attached hereto and incorporated herein by reference (the "Mortgaged Property") which lien is first, prior and superior to any and all other liens and encumbrances thereon, except for any liens securing the payment of unpaid and

delinquent ad valorem taxes on the Mortgaged Property.

3. That the Mortgaged Property shall be sold by the Master Commissioner of the Clinton Circuit Court (the "Master Commissioner"), free and clear of the interest and claims of the parties hereto and all liens and encumbrances thereon, subject only to [i] the lien for current ad valorem taxes and [ii] any easements or restrictions recorded prior to the recordation of Spring Creek Enterprises, Inc.'s Mortgage, to which SRN is a successor-in-interest.

4. That the Master Commissioner is ordered and directed to offer the Mortgaged Property at public sale, by the Master Commissioner on a date to be set by the Master Commissioner in the City of Albany, Clinton County, Kentucky upon the following terms and conditions:

A. The real estate securing the indebtedness shall be offered for sale as a whole, then re-offered for sale individually, with the property being sold in the manner bringing the highest price.

B. The purchaser shall be required to make a cash deposit of ten percent (10%0 of the sale price at the time of sale;

C. The purchaser shall be required to assume and pay all ad valorem taxes and assessments for the current tax year and all subsequent years;

D. The purchaser shall be required to execute a bond or bonds with sufficient sureties thereon which shall have the force and effect of a judgment in order to secure the payment of the balance of the purchase price, with interest thereon at the rate of twelve percent (12%) per annum until paid, and said bond shall constitute a lien on said property until paid;

E. Any purchaser or purchasers shall have the privilege of paying all or any part of the purchase price or paying said bond or bonds before maturity by paying the balance of principal, together with all accrued interest thereon;

F. Upon default of said deposit by the purchaser, the Commissioner shall resell the property upon the same terms and conditions set out herein;

G. The Mortgaged Property shall be sold free and clear of the claims and interests of all parties herein and of all liens and encumbrances of record thereon except restrictions and easements appearing of record in the Clinton County Court Clerk's office prior to the recordation of the Spring Creek Enterprises, Inc's Mortgage, to which SRN in a successor-in-interest.

H. The Commissioner before making said sale, shall

advertise the time, place and terms thereof by inserting a notice of the time, place and terms of said sale, together with a description of the property to be sold and the amount for which it is to be sold in a newspaper of general circulation in Clinton County, Kentucky, at least once a week for three successive weeks receding the date of sale;

I. The Commissioner, before making said sale, shall appoint two disinterested housekeepers, not related to any of the parties in this action, to appraise the Mortgaged Property. The appraisers shall be sworn by the Commissioner before making their appraisal in writing to the Commissioner, the same to be a part of the record in this action;

J. In the event that the successful bidder is SRN, it shall n ot be required to make any cash deposit of bond and the Commissioner shall credit the purchase price against the amount of SRN's judgment herein;

K. Possession shall be given to the purchaser upon payment of the full purchase price. Risk of loss on improvements shall pass to the purchaser upon confirmation of the sale.

L. That the Defendant, Air Park or any tenant thereof, immediately vacate and surrender the Mortgaged Property herein described.

5. That Spring Creek Enterprises, Inc's mortgage lien, to which SRN is a successor-in-interest, herein adjudged shall attach to the proceeds of the sale of the Mortgaged Property and shall be first, prior and superior to any and all other liens and encumbrances thereon except for any liens securing the payment of unpaid and delinquent ad valorem taxes, if any.

6. That any proceeds of the sale remaining after the payment of the costs and expenses of the sale, the payment of delinquent ad valorem tax liens, the payment of Spring Creek Enterprises, Inc.'s first, prior and superior mortgage lien on the Mortgaged Property, to which SRN is a successor-in-interest, shall be paid pursuant to further orders of the Court.

7. That the Court shall retain jurisdiction over this action regarding any additional matters which may come on for hearing, including, without limitation, confirmation of the sale, determination of the priorities of the parties, and distribution of proceeds.

8. That the Defendant, Air Park and/or any persons or entities in possession of the Mortgaged Property shall immediately vacate the Mortgaged Propertry.

9. This Summary Judgment and Order of Sale, as to the issues disposed of herein, is final, there being no just reason for delay.

10. The Clerk of the Court is hereby ordered and directed to serve copies of this Summary Judgment and Order of Sale upon all parties to this action.

ENTERED this 16th day of June, 2003.

Eddie Lovelace
Judge, Clinton Circuit Court

(2)

Supreme Court, U.S.
FILED
SEP 3 - 2005
OFFICE OF THE CLERK

No. 05-211

In The

Supreme Court of the United States

LINDA STETLER AND DENNY STETLER,

Petitioners,

versus

SRN ENTERPRISES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Kentucky

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES

Linda Stetler and Denny Stetler, Petitioners

SRN Enterprises, Inc., Respondent

Pursuant to United States Supreme Court Rule 29.6, SRN Enterprises, Inc., hereby discloses that:

1. It is not a subsidiary of any other entity;

2. No parent or publicly held company owns any of its stock.

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BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the order denying discretionary review entered by the Kentucky Supreme Court on May 11, 2005 (the "Order"). The Order is not contained in any official or unofficial report of Kentucky cases.

JURISDICTION

28 U.S.C. § 1257 does not provide the Court a basis for jurisdiction to review this matter.

STATUTORY PROVISIONS INVOLVED

KY. REV. STAT. ANN. § 422.240 (Michie 1992)[1]

Kentucky Rule of Civil Procedure 73.02[2]

STATEMENT OF THE CASE

The Petition relates to a real property mortgage foreclosure action prosecuted in the Clinton County, Kentucky Circuit Court. The property encumbered by the mortgage subject of that action was at all times relevant herein owned by Spring Creek Air Park, Inc. The Petitioners did not own the property subject of the foreclosure

[1] The language of this statute is set out verbatim at App. 1.

[2] The language of this statute is set out verbatim at App. 2-3.

during any time period relevant to the Petition. Nor was the judgment from which Petitioners seek relief entered against them. No other facts relevant to the substantive merits of the underlying foreclosure action are relevant here.

On June 16, 2003, the Clinton Circuit Court granted Respondent's Motion for Summary Judgment and entered a Judgment and Order of Sale against Spring Creek Air Park, Inc., a defendant in the trial court and the owner of the encumbered property. (Petition, Appendix H). On June 25, 2003, the Petitioners filed a Motion To Alter, Amend Or Vacate the Judgment and Order of Sale.

Sometime thereafter, the parties learned that the Clinton Circuit Court clerk had misplaced the record of pleadings in that action. On January 30, 2004, the Respondent filed a motion to reestablish the record, which supplied the undersigned counsel's file copies of all pleadings in the action and counsel's affidavit attesting that the attached pleadings were true and accurate copies. On March 5, 2004, the trial court denied the Petitioners' Motion to Alter, Amend Or Vacate the Judgment and Order of Sale, and *granted Respondent's motion to reestablish the record*.[3] Neither the Petitioners nor any other party to the proceedings in the trial court has ever claimed

[3] Throughout the state court proceedings below and again at pages four, five and twelve of their Petition, the Petitioners have asserted that the trial court first considered issues concerning the lost record when they filed a second motion to alter, amend or vacate judgment on March 18, 2004. However, that contention is belied by the trial court's *March 5, 2004* order granting Respondent's motion to reestablish the lost record.

that the pleadings supplied by Respondent's counsel to reestablish the record were inaccurate or incomplete.

The Petitioners filed a second Motion To Alter, Amend Or Vacate the Judgment and Order of Sale on March 18, 2004. That motion was denied by order entered on April 1, 2004.

The Petitioners filed a Notice of Appeal to the Kentucky Court of Appeals on May 1, 2004. The Kentucky Court of Appeals dismissed Petitioners' appeal as untimely by Order entered on July 1, 2004. (Petition, Appendix F). The Petitioners' Motion for Reconsideration of that dismissal was denied by Order entered on August 23, 2004. (Petition, Appendix E).

The Petitioners then moved the Kentucky Supreme Court for discretionary review. Spring Creek Air Park, Inc. did not file a motion for discretionary review with the Kentucky Supreme Court. The Petitioners' motion for discretionary review was denied by the Kentucky Supreme Court's June 11, 2005 Order. (Petition, Appendix D). The Petition seeks review of the Order denying discretionary review.

ARGUMENT

I. THE PETITIONERS DID NOT OWN THE PROPERTY SUBJECT OF THE UNDERLYING ACTION AND THUS LACK STANDING TO ASSERT ANY CLAIM THAT THEY WERE DEPRIVED OF PROPERTY WITHOUT DUE PROCESS REQUIRED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Petitioners lack standing to seek review from this Court because they do not own the property subject of the underlying action. The fact that the Petitioners conveyed the property to Spring Creek Air Park, Inc., prior to entry of the judgment in question, is stated at page one of their Petition. The underlying judgment from which the Petitioners seek review was entered against Spring Creek Air Park, Inc., and not the Petitioners. *See* June 16, 2003 Summary Judgment and Order of Sale, Petition, Appendix H. Spring Creek Air Park, Inc. did not seek review of the dismissal of their appeal from the judgment by filing a motion for discretionary review with the Kentucky Supreme Court.

"Ordinarily, of course, a litigant "'must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *U.S. Dept. of Labor v. Triplett*, 494 U.S. 715, 720 (1990) (quoting *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474, 102 S.Ct. 752, 759, 70 L.Ed.2d 700 (1982) (quoting *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975))). The Petitioners attempt to assert the legal rights or interests of a separate entity against whom judgment was entered. The Petitioners lack

a constitutionally protected property interest which could have been affected in a manner raising issues warranting review by this Court. No extraordinary circumstances for third-party standing are present. Thus, the Petition should be denied because the Petitioners lack standing.

II. THE PETITIONERS HAVE NOT IDENTIFIED ISSUES FALLING WITHIN THIS COURT'S JURISDICTION TO REVIEW JUDGMENTS OR DECREES FROM THE KENTUCKY SUPREME COURT UNDER 28 U.S.C. § 1257.

The Petition must also be denied because it fails to identify any issue creating jurisdiction for this Court to review the judgments or decrees of the Kentucky Supreme Court. 28 U.S.C. § 1257 describes this Court's jurisdiction to review matters decided by the highest courts of the states, as follows:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

The Petitioners are obviously displeased with the results of the subject litigation in the Kentucky Courts, but they raise no federal issues that would give the Court jurisdiction for review pursuant to 28 U.S.C. § 1257.

The Petitioners attempt to raise issues arising from the proper application of two points of well-established Kentucky civil procedure – the reestablishment of a lost record of pleadings[4] in the trial court, and the application of Kentucky's thirty-day deadline for instituting an appeal. The Petition lists questions involving the application of the Due Process clauses of the Fifth and Fourteenth Amendments to those areas of Kentucky procedure, but no such claims are argued.

Nor were any Due Process issues raised by Petitioners below in the Kentucky Courts. That failure alone should result in denial of the Petition by this Court. In *Adams v. Robertson*, 520 U.S. 83, 86 (1997), this Court explained that "we have adhered to the rule in reviewing state-court judgments under 28 USC § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered

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[4] The Petition fails to elaborate on any issue related to the fact that the trial court relied on pleadings supplied by the undersigned counsel to reestablish the lost record. Although Kentucky provides a statutory procedure for reestablishing a lost record, KY. REV. STAT. § 422.240, it has long been the rule in the Commonwealth that this statutory procedure is not mandatory. *See May v. May*, 150 Ky. 522, 150 S.W. 685, 686 (1912) ("there [are] two methods of supplying lost pleadings: One the statutory method of a reference to a commissioner; the other the common-law method of a substitution by the court."). Moreover, the Petitioners have never claimed that a complete set of accurate pleadings was not submitted to the trial court.

the decision we have been asked to review." The Court also explained,

> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, . . . and the aggrieved party bears the burden of defeating this assumption . . . by demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here'. . . .

Id. at 86-87 (citations omitted).

The Petitioners seek review from a two-sentence order by which the Kentucky Supreme Court declined to review the intermediate appellate court's dismissal of their untimely appeal. The Order contains nothing indicating that a federal question was raised by Petitioners below. *See* June 11, 2005 Order, Petition, Appendix H. No other attempt to show the preservation of the type of federal issue described in 28 U.S.C. § 1257 is made by the Petitioners. To the extent a federal question has been raised in the Petition, no such issue was preserved for review. Thus, the Petition must be denied.

III. THE PETITIONERS FAILED TO MEET KENTUCKY PROCEDURAL REQUIREMENTS THAT PROVIDE AN INDEPENDENT AND ADEQUATE GROUND FOR THE STATE COURT JUDGMENT.

The Order let stand the dismissal of an appeal which was properly grounded on an independent and adequate state procedural ground relating to appellate deadlines in Kentucky's Courts. Thus, the Petition must be denied. *See Robertson*, 520 U.S. at 87; *Michigan v. Tyler*, 436 U.S. 499,

512 n. 7 (1978). In *Tyler*, this Court explained, "Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule."

The Petitioners did not file a timely appeal from the trial court's judgment, the Kentucky Court of Appeals dismissed the appeal on that basis, and the Kentucky Supreme Court denied review. Kentucky has a legitimate interest in enforcing the procedural rules that resulted in the dismissal. Thus, any review by this Court is foreclosed by the Petitioners' failure to present any issue warranting review in a timely fashion under independent and adequate Kentucky law.

A brief review of the relevant Kentucky authority and its application to the procedural history of the underlying action shows that the Kentucky Supreme Court's decision to deny review rests on independent and adequate state procedural grounds. Kentucky Rule of Civil Procedure 73.02(1) states that a notice of appeal "shall be filed within thirty days after the date of notation of service of the judgment or order [by the clerk of the court]." The notation of service of the trial court's Judgment and Order of Sale was made on June 16, 2003.

The Petitioners filed a Motion to Alter, Amend or Vacate under Kentucky Rule of Civil Procedure 59 on June 25, 2003, which tolled the running of the thirty-day time limit to file a notice of appeal until entry of service of an order denying that motion. *See* Ky. R. Civ. P. 73.02(e). The notation of service on the trial court's order denying the Petitioner's Motion to Alter, Amend or Vacate was made on

March 5, 2004, which set the deadline to timely file a notice of appeal at April 5, 2004. The Petitioners did not file a notice of appeal until May 1, 2004. Thus, the appeal was not timely filed and was properly dismissed.

The Kentucky Rules of Civil Procedure do not permit successive post-judgment motions. *See Cloverleaf Dairy v. Michels*, 636 S.W.2d 894, 895-896 (Ky. App. 1982). Motions to reconsider the denial of a post judgment motion do not toll the time for a Kentucky litigant to take an appeal. *See Rodger v. Berry*, 346 S.W.2d 43 (Ky. 1961); *Taylor v. Warmon*, 331 S.W.2d 899 (Ky. 1960). Thus, the Petitioners' second Motion to Alter, Amend or Vacate was a nullity and did not toll the running of time to file the Notice of Appeal.

The Kentucky Court of Appeals relied on Petitioners' procedural error to dismiss the appeal (July 1, 2004 Order, attached as Appendix F to the Petition),[5] and the Kentucky Supreme Court denied review without explanation. As is

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[5] The Kentucky Court of Appeals also rejected the Petitioners' reliance on cases from other jurisdictions holding that the time for appeal is tolled when a second post-judgment motion raises issues not previously considered in the litigation which are based on newly discovered evidence. *See* August 23, 2004 Order Denying Motion to Reconsider, Petition, Appendix E. On the Motion, the Petitions asserted, as they continue to assert in the Petition, that the issues surrounding the lost record were first brought to the trial court's attention by their second post-judgment motion filed on March 18, 2004. However, as noted above, the trial Court granted the Respondent's Motion to Reestablish the Record by Order dated March 5, 2004, which also denied the Petitioners' first post-judgment motion. The Kentucky Court of Appeals noted that the authority from other jurisdictions was not persuasive and distinguished it by recognizing that the court had already ruled on the "new" lost record issue that the Petitioners claimed to have first presented to the trial court in the second motion. *See* August 23, 2004 Order Denying Motion to Reconsider, Petition, Appendix E.

evident from the authority cited above and the absence of contrary Kentucky authority, the rule of appellate procedure applied to dismiss the Petitioners' appeal is well-established and uniformly applied.

The Petition is almost exclusively devoted to authority from jurisdictions with procedural requirements which differ from the Kentucky procedure described above. Petitioners make no meaningful claim or elaborate on the contention that Kentucky's procedure for filing timely appeals falls below minimal constitutional requirements. Nor do the Petitioners claim that the foreign cases in their Petition describe procedural rules that are absolutely required of states by the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. The Commonwealth of Kentucky has a legitimate interest in achieving orderly appellate practice and pursues that goal by enforcing the procedural rules governing the time in which appeals must be taken. The Petitioners did not follow those rules, and their appeal was properly dismissed. The dismissal of the appeal and denial of review by the Kentucky Supreme Court rests on those independent and adequate state procedural grounds. To the extent a federal question has been raised in the Petition, no such issue was preserved for review. Thus, the Petition must be denied.

CONCLUSION

Based on the foregoing, the Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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KY. REV. STAT. ANN. § 422.240 (Michie 1992)

(1) If the records or papers of any court are lost, destroyed, defaced, or obliterated, the court shall appoint a commissioner, who shall have power and authority to fix on a convenient place to meet for the purpose of hearing evidence in regard to the lost records or papers, giving reasonable public notice thereof.

(2) The commissioner shall be paid a reasonable compensation out of the county treasury and shall not remain in office longer than one (1) year.

(3) The commissioner may, at the instance of any person, issue a summons and cause the attendance of witnesses, and take evidence, in writing, of such witnesses, relative to any record or paper so destroyed, defaced, or obliterated. The deposition shall be legal evidence, and shall be returned to the clerk of the court and safely kept by such clerk. Before any proof is taken, the party offering it must make and file with the commissioner an affidavit that there is no attested copy of the record or papers in existence known to him. If the affidavit is not made, no testimony taken shall be evidence.

Kentucky Rule of Civil Procedure 73.02

(1) (a) The notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2).

(b) If an appeal or cross-appeal is from an order or judgment of the circuit court, the filing fee required by Rule 76.42(2)(a)(i) or (ii) shall be paid to the clerk of the circuit court at the time the notice of appeal or cross-appeal is

tendered, and the notice shall not be docketed or noted as filed until such payment is made. Motions to proceed in forma pauperis on such an appeal or cross-appeal must be addressed to the circuit court. If timely tendered and accompanied by a motion to proceed in forma pauperis supported by an affidavit, a notice of appeal or cross-appeal shall be considered timely but shall not be filed until the motion to proceed in forma pauperis is granted or, if denied, the filing fee is paid. If the motion to proceed in forma pauperis is denied, the party shall have ten days within which to pay the filing fee or to appeal the denial to the appropriate appellate court. Time for further steps in the appeal or cross-appeal shall run from the date that the notice of appeal is filed upon payment of the filing fee or the granting of the motion to proceed in forma pauperis.

(c) If an appeal or cross-appeal is from an order or judgment of the district court, the filing fee required by KRS 23A.210 or 23A.205(1) shall be paid to the clerk of the district court at the time the notice of appeal or cross-appeal is filed, and the notice shall not be docketed or noted as filed until such payment is made.

(d) Upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment or an order which affects the running of the time for taking an appeal, the trial court may extend the time for appeal, not exceeding 10 days from the expiration of the original time.

(e) The running of the time for appeal is terminated by a timely motion pursuant to any of the Rules hereinafter enumerated, and the full time for appeal fixed in this Rule commences to run upon entry and service under Rule 77.04(2) of an order granting or denying a motion under

Rules 50.02, 52.02 or 59, except when a new trial is granted under Rule 59.

(2) The failure of a party to file timely a notice of appeal, cross-appeal, or motion for discretionary review shall result in a dismissal or denial. Failure to comply with other rules relating to appeals or motions for discretionary review does not affect the validity of the appeal or motion, but is ground for such action as the appellate court deems appropriate, which may include:

(a) A dismissal of the appeal or denial of the motion for discretionary review,

(b) Striking of pleadings, briefs, record or portions thereof,

(c) Imposition of fines on counsel for failing to comply with these rules of not more than $500, and

(d) Such further remedies as are specified in any applicable Rule.

(3) When the right of appeal in special civil cases is granted by statute, such appeals shall be prosecuted as provided in KRS 446.190.

(4) If an appellate court determines that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that it is so totally lacking in merit that it appears to have been taken in bad faith.

(3)

No. 05-211

FILED
SEP 30 2005
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LINDA STETLER AND DENNY STETLER,
Petitioners,

versus

SRN ENTERPRISES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky

REPLY OF THE PETITIONERS TO THE BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY OF THE PETITIONERS TO THE BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petitioners, in Reply to the Brief of the Respondent in Opposition to Petition for Writ of Certiorari, state as follows:

COUNTERSTATEMENT OF THE CASE

In its Brief, the Respondent correctly notes that the Petitioners did not own the property in question at the time of foreclosure. The Respondent, however, has failed to note that it was the Respondent, Plaintiff below, who impleaded Linda Stetler and Denny Stetler as parties Plaintiff, thus bringing them into the instant action.

The Respondent further notes, also correctly, that on March 18, 2004, the Petitioners filed a second Motion to Alter, Amend or Vacate the Judgment and Order of Sale entered by the Clinton Circuit Court. Respondent has, however, failed to note that the second Motion to Alter, Amend or Vacate contained new matter concerning issues which had arisen during the seven and one-half months between the date on which Petitioners filed their first Motion to Alter, Amend or Vacate on June 23, 2003, and the date on which the Clinton Circuit denied that Motion March 5, 2004.

The Respondent has also failed to note that, at the time the subject property was offered for sale, it was subject to an automatic stay by the United States Bankruptcy Court for the Western District of Kentucky, Bowling Green Division. That matter is currently pending before the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

I. THE PETITIONERS DID NOT LACK STANDING TO ASSERT THE CLAIMS PRESENTED HEREIN.

In its Brief, the Respondent states, correctly, that the Petitioners did not own the property in question on the date of the sale. Respondent then asserts, erroneously, that for this reason, "The Petitioners lack standing to seek review from this Court."

Respectfully, Petitioners insist that the Respondent is mistaken.

As an examination of the Complaint which SRN Enterprises, Inc., filed herein will show, it was the Respondent itself which brought the Petitioners into this action. While the Complaint is hardly a model of clarity, and it is not clear exactly why the Respondent impleaded the Petitioners as parties Defendant in the Court below, Petitioners apprehend that it was because they both were signatories on the mortgage whhich secures the note here sued on.

For that reason, it is manifest that, should the execution sale sought by SRN have failed to produce sufficient funds to satisfy the outstanding obligation, the Petitioners individually, as signatories on the mortgage, and therefore guarantors of the obligation, would have been personally liable for the remainder owed on the note.

In its Brief, Respondent cites this Court's holding in *U.S. Dept. of Labor v. Triplett*, 494 U.S. 715 (1990), to the effect that:

> Ordinarily, of course, a litigant must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.

U.S. Dept. of Labor v. Triplett, 494 U.S. at 720 (internal quotations omitted).

The Petitioners agree that such is the law. They respond, however, that they are asserting their own legal rights and interests, rather than those of third parties. As the treatise Corpus Juris Secundum sets out the rule:

> [I]t is almost universally recognized that every party to the record who has any interest that would be directly affected by a determination in an appellate review mus be made a party to the review proceedings . . . Thus it is a general rule of appellate practice and procedure that all persons who were parties to the action in the court below and who will be affected by, or who are interested in, the judgment, order, or decree, that is, all parties who will be affected by a reversal or modification of the

> judgment or decree . . . must be made parties to the appellate proceedings.

4 C.J.S. *Appeal and Error* § 232 at nn. 91-93, 95 (1993).

Moreover, the United States Court of Appeals for the Ninth Circuit has held that a party secondarily liable may appeal, even though the party primarily liable has chosen not to appeal. *U.S. ex rel. Celonese Coatings Co. v. Gullard*, 504 F.2d 466, 469 (9th Cir. 1974).

The Respondent's argument that the Petitioners lack standing, therefore, fails; and the Court must so hold.

II. THE RESPONDENT IS ESTOPPED TO ASSERT THE PETITIONERS' SUPPOSED LACK OF STANDING, AND HAS NOT PRESERVED THE ISSUE FOR APPEAL.

The foregoing argument is absolutely dispositive of the Respondent's claim that the Petitioners lack standing; and it proves that this assertion lacks merit and should be disregarded. However, even assuming *arguendo* that the Respondent's claim on this point had merit (and it does not), the Respondent still could not prevail, because it is estopped to assert the Petitioners' (supposed) lack of standing.

The equitable doctrine of estoppel by record is too well established to require either argument or the citation of extensive authority. It holds that a party may not deny the truth of that which he has previously asserted in the same action.

The basis of the Respondent's standing argument is that the Petitioners lack a justiciable interest in the instant action because they did not own the property at the time of the (purported) sale. As noted above, it was the Respondent itself which chose to implead the Petitioners as parties Defendant herein. By so impleading them, the Respondent asserted its belief that they did, in fact, have some justiciable interest in the instant proceeding. Having so asserted, the Respondent may not now be heard to argue that the Petitioners were and are not proper parties, or that they have no interest in the subject matter of this appeal.

The Respondent has also asserted that:

> The underlying judgment from which the Petitioners seek review was entered against Spring Air Park, Inc., and not the Petitioners.

Brief of Respondent at 4.

As the Court is undoubtedly aware, Kentucky courts do not recognize interlocutory appeals in civil actions, absent a certification of appealibility. CR 54. A judgment, in order to be "final and appealable," must resolve all of the issues as to all of the parties. Since the Respondent did not assert that the appeal which Petitioners filed in the Kentucky Court of Appeals was premature, they necessarily conceded that it had, in fact, resolved all of the issues as to all of the parties. Having failed to raise this question in either of the appellate courts below, the Respondent may not now, when it suits its purpose, assert for the first time that the judgment rendered by Clinton Circuit Court was not binding upon the Petitioners.

It hardly seems necessary to add that, since the Respondent did not raise this point in the courts below, it has not been properly preserved for appeal. *Adams v. Robertson*, 520 U.S. 83, 86 (1997).

III. THE ISSUES PRESENTED FALL WITHIN THE COURT'S JURISDICTION TO REVIEW JUDGMENTS OF DECREES FROM THE KENTUCKY SUPREME COURT UNDER 28 U.S.C. § 1257.

In its Brief, the Respondent states that this appeal involves:

> [T]he proper application of two points of well-established Kentucky civil procedure - the reestablishment of a lost record of pleadings in the trial court, and the application of Kentucky's thirty-day deadline for instituting an appeal.

Brief of Respondent at 6.

The Respondent insists, however, that neither the reestablishment of a lost record nor a state statute of limitations, implicates the Due Process Clause of the Fourteenth Amendment. Respectfully, Petitioners insist that the Respondent is mistaken.

This Court has considered the question of whether lost state court records had been properly reestablished, on a number of occasions. The attention of the Court and counsel is respectfully directed to the holding of *Weatherhead's Lessee v. Baskerville*, 52 U.S. 329 (1850), in which this Court wrote:

> The point still to be noticed is so much of the instruction given to the jury, informing them that they might presume from the evidence that there had been a legal partition of the testator's land in respect to his daughters by order of a court when the executor assigned them certain parts of it. By the law of Tennessee such a partition is a judicial act and becomes a record. It can only be proved as such records may be, and, when it is alleged to have been lost or destroyed, its contents can only be reached by proofs of a certain and fixed kind, well known in the law. In the proper sense of the term "presumed<" the records of courts are never so. The existence of an ancient record of another kind maqy sometimes be established by presumptive evidence. But that is not done without very probable proof that it once exis'ed, and until its loss is satisfactorily accounted for. The rule in respect to judicial records is that, before inferior evidence can be received of their contents, their existence and loss must be clearly accounted for. It must be shown that there was such a record, that it has been lost or destroyed, or is otherwise incapable of being produced, or that its mutilation from time or accident has made it illegible; in this last, though, not without the production of the original in the condition in which it may be. The inferior evidence to establish the existence of a judicial record must be something officially connected with it, such as the journals of the court, or some other entry, though short of the judgment or record, which shows that it has been judicially made. The burning of an office and of its records is no proof that a particular record had ever existed. It only lays the foundation for the inferior evidence. If that cannot be got, the result must be, and is, that there has been an allegation of the existence of a record, without proof. There is no

> way of bringing it to the knowledge of others. Nor can it be said to be known certainly by him who asserts it. In this case, without any such proof, the jury was told that they might infer, from the burning of the records of the county of Mero and the conduct of the parties interested in the testator's lands, that there had been a partition according to law. If the instruction is put exclusively upon the want of proof to justify it, it could not be maintanied. But it was contrary to the positive proof in the record.

Weatherhead's Lessee v. Baskerville, 52 U.S. at 651-52.

The United States Court of Appeals for the Fourth Circuit similarly held in *Pineland Club v. Robert*, 171 F. 341, 347-48 (4th Cir. 1909), and in *Brown v. Harkins*, 131 F. 63 (4th Cir. 1904). In the latter case, the Fourth Circuit cited this Court's holding in *Weatherhead's Lessee v. Baskervills*, quoted above, and then cited nine additional holdings of this Court in which, the Fourth Circuit stated, this Court had considered the reconstruction of lost state court records to implicate federal constitutional rights. *Brown v. Harkins*, 131 F. at 66-67.

It is clear, therefore, that contrary to the Respondent's assertion, failure to utilize adequate procedures when reconstructing lost state court records, implicates federal constitutional guarantees.

The proper application of state statutes of limitation also implicates federal constitutional guarantees. In fact, this Court has twice stated that it will consider the constitutionality of state statutes of limitations. *Michel v. Louisiana*, 350 U.S. 91 (1955); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1944). In the latter case, this Court stated clearly that if a state statute of limitations is applied in an arbitrary or inequitable manner, it violates the United States constitution. 325 U.S. at 315-16.

CONCLUSION

Based on the foregoing, the Petitioners respectfully request that the Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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